Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-659 (5)

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN,
Petitioner

v.

UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,
Respondents,

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appendix, Vol. 2, Supplementary

Laurence A. Elgin
2762 Woodley Place, N.W.
Washington, D.C. 20008
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33 pp

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTIO NO.

ALWIN E. HOPFMANN
29 Tuttle Road
Sterling, MA 01564,

Petitioner,

v.

UNITED STATES FEDERAL
ELECTION COMMISSION
Washington, D.C. 204634

and

EDWARD M. KENNEDY
109 Russell Senate Office Bldg.
Washington, D. C. 20510

and

THE COMMITTEE TO RE-ELECT
SENATOR KENNEDY
140 Federal Street
Boston, MA 02110

Respondents.

PETITION TO DECLARE FEDERAL ELECTION COMMISSION ACTION CONTRARY TO THE LAWS AND TO THE CONSTITUTION

Petitioner, ALWIN E. HOPFMANN, acting by and through his undersigned attorney, hereby petitions this honorable court to

review action taken by the FEDERAL ELECTION COMMISSION in dismissing petitioner's Complaint, filed on September 13, 1982, a copy of which is attached hereby and hereby incorporated by reference into this petition which dismissal was by letter dated October 25, 1982 and served upon the petitioner-plaintiff by mail at his home in Massachusetts, which letter was accompanied by a document entitled "EXPEDITED FIRST GENERAL COUNSEL'S REPORT" which was signed for respondent by Charles N. Steele, General Counsel of the respondent FEDERAL ELECTION COMMISSION by one Kenneth A. Gross, as Associate General Counsel of the respondent FEDERAL ELECTION COMMISSION and also by a copy of a letter to William C. Oldaker, Esquire, of the firm of Epstein, Becker, Borsody and Green, P.C., 1140 19th Street, N.W., Washington, D.C. 20036 as attorneys for EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY as

the respondents before the FEDERAL ELECTION COMMISSION. Both of these last-named documents are also attached hereto and incorporated herein by reference.

Jurisdiction is granted to this court by 2 USC 437g(a)(8)(A) and (B), redesignated as section 309 of the Federal Election Campaign Act providing for appeals from dismissal by the Federal Election Commission and by the Administratiave Procedure Act, 5 USC 551, et seq., the Federal Declaratory Judgment Act 28 USC Secs. 2201 and 2202, and the "Federal Question" statute, 28 USC 1331 and, with regard to constitutional questions properly raised herein, 2 USC 437h.

Petitioner requests the court to declare that the dismissal of the aforesaid complaint by the FEDERAL ELECTION COMMISSION ("FEC") was contrary to law and the Constitution and to direct the FEC as to the applicable law and to take action to

conform therewith within thirty (30) days. In the alternative, if the Court finds it within its power to do so, Petitioner requests this Court to find that respondents have violated the law as alleged in the Complaint filed with the FEC and order such relief as is appropriate under the laws of the United States.

Petitioner hereby informs the Court and the respondents that they will be filing subsequent hereto, pursuant to 2 USC 437h, a specific Complaint challenging the Constitutionality of the Federal Election Campaign Act and several provisions thereof, as applied in this instance to the petitioner-plaintiff and will be seeking the certification of constitutional questions to the full panel of the Court of Appeals which is provided for in that statute as well as the expedited procedure provided for therein generally since petitioner-plaintiff is duly registered to

vote for the President of the United States.

It is expected that the constitutional violations complained of in that complaint will embrace, or if decided in favor of petitioner-plaintiff, will render moot many of the errors of law for which petitioner--plaintiff seeks relief in this petition and that, therefore, the court may wish to postpone any action on that matter and the respondents may wish to defer any answer until such complaint is filed.

Petitioner-plaintiff files this petition at this time in order to preserve its right of appeal under 2 USC 437g and such other statutes named herein as they may be relevant to that right if appeal and intends to present the broader constitutional issues involved more fully in the complaint to be filed under 2 USC 437h.

Respectfully submitted,

ALWIN E. HOPFMANN

by: Laurence A. Elgin
Attorney for Petitioner-
Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3667

ALWIN E. HOPFMANN

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
et. al.,

Defendants.

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS NAMED RESPONDENTS EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

Pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant Federal Election Commission hereby moves that Edward M. Kennedy and The Committee to Re-Elect Senator Kennedy be dismissed from this proceeding.

In support of this motion, the Federal Election Commission relies on its Points and authorities submitted herewith.

Respectfully submitted,

Charles N. Steele
General Counsel

Lawrence M. Noble
Assistant General Counsel

Marsha G. Gentner
Attorney

Deborah Felton
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, NW
Washington, DC

(202) 523-4060

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALWIN E. HOPFMANN, Plaintiff,	)	Civil Action
v.	)	No. 82-3667
FEDERAL ELECTION COMMISSION, et al. Defendants.	)	

PLAINTIFF'S CONCURRENCE IN THE MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS NAMED RESPONDENTS EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

Plaintiff, acting by and through his attorney, having studied the aforementioned motion of the defendant Federal Election Commission, and having studied the Memorandum of Points and Authorities filed in support thereof, in general agrees with the position taken by the defendant Federal Election Commission ("FEC") in the aforesaid motion, provided that, it is understood clearly that the dismissal resulting from such Motion will be without prejudice to the undertaking of a private cause of action by the plaintiff

when the additional steps in the FEC enforcement process alluded to by the defendant FEC in the aforesaid memorandum have been taken, and, provided further that,it is understood that plaintiff's contentions as to the unconstitutionality and illegality of the Federal Election Campaign Act as amended as it requires the exhaustive exhaustion of remedies referred to by the defendant FEC in the aforesaid Memorandum , are not affected by this concurrence with the Motion of the Defendant FEC.

Respectfully submitted,

Laurence A. Elgin
Attorney for Laintiff
Suite 307
1317 F Street, N.W.

Washington, D.C. 20004
202/628-1114
D.C. Bar No. 159582

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing PLAINTIFF'S CONCURRENCE IN THE MOTION OF THE FEDERAL ELECION COMMISSION TO DISMISS NAMED RESPONDENTS EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY have been served by United States mail, postage prepaid, this 8th day of February, 1983, upon the following counsel: [all names of counsel are then listed.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3667

ALWIN E. HOPFMANN,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant

PLAINTIFF'S FIRST AMENDED COMPLAINT
(Filed as a Matter of Course,
Pursuant to F.R.C.P. 15(a)

1. This action seeks declaratory and injunctive relief against certain provisions of the Federal Election Campaign Act et. seq. (hereinafter referred to as the FECA), the Federal Election Campaignb Act Amendments of 1974, Public Law 93-443, 88 Stat. 1236 (hereinafter referred to as the FECA Amendments of 1974), the Federal Election Campaign Act Amendments of 1976, Public Law 94-283, 90 Stat. 475 (hereinafter referred to as the FECA Amendments of 1976), the Federal Election Campaign Act

INCORPORATION OF PETITION FOR APPEAL PREVIOUSLY FILED

7. Plaintiff hereby repeats the allegations of Paragraphs 1 through 6 above and incorporates them by reference herein together with the Petition for Appeal previously filed in this matter, which was entitled PETITION TO DECLARE FEDERAL ELECTION COMMISSION ACTION CONTRARY TO THE LAWS AND TO THE CONSTITUTION, which is also incorporated herein by reference.

PARTIES

8. Plaintiff Alwin E. Hopfmann is a United States citizen from the State of Massachusetts. He is a citizen also of that State.

9. Plaintiff is eligible to vote in elections for the office of President of the United States. He is a registered voter in Massachsuetts in the Democratic Party.

10. In the 1982 Massachusetts primary race for U.S. Senator, Plaintiff sought the

campaign for U.S. Senatorial nominee of the Massachusetts democratic party in this instance and to compel Edward M. Kennedy and the Committee to Re-elect Senator Kennedy to do everything else necessary to comply with applicable law considering the primary campaign as having terminated at the pre-primary convention, including treating all contributions which were made thereafter as contributions to the general election campaign and not the primary, and

66. That the Court declare the FEC in violation of the laws and the Constitution of the United States in all particulars as set out herein, and enjoin any such further violations, declaring all such illegal and/or unconstitutional acts heretofore taken to be void, and

67. That the Court grant sucu other and further relief as may be appropriate or may be necessary in order to assure justice and compliance iwth the laws and the Constitu-

tion of the United States.

Respectfully submitted,

Laurence A. Elgin
Atorney for Plaintiff
Suite 307
1317 F Street, NW
Washington, D.C. 20004
202/628-1114
D.C. Bar No. 159582

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALWIN E. HOPFMANN, Plaintiff,	)	Civil Action No. 82-3667
v.	)	
FEDERAL ELECTION COMMISSION, et al. Defendants.	)	

FEDERAL ELECTION COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

On February 15, 1983, defendant Federal Election Commission [hereinafter cited as FEC or Commission] received plaintiff Alwin Hopfmann's concurrence to the FEC's motion to dismiss Senator Edward M. Kennedy and the Committee to Re-elect Senator Kennedy, and opposition to the FEC's motion to dismiss for lack of jurisdiction, insufficiency of service of process, and failure to prosecute. The FEC submits the following reply to plaintiff Hopfmann's concurrence and opposition.

I. The Motion to Dismiss Senator Kennedy and the Committeeto Re-Elect Senator Kennedy Should be granted

In response to the Commission's motion to dismiss defendants Senator Edward Kennedy and the Committee to Re-Elect Senator Kennedy, plaintiff Hopfmann concedes that the FEC is correct in asserting that plaintiff has not satisfied the express conditions precedent to bringing a private cause of action for alleged violation of federal election laws. See 2 U.S.C. 437g (a)(8). Therefore, inasmuch as plaintiff Hopfmann has filed a concurrence to the FEC's motionto dismiss Senator Kennedy and the Committee to Re-Elect Senator Kennedy, those defendants should be dismissed from this action, with prejudice.1/

****

1/ The Commission seeks dismissal with prejudice because plaintiff cannot bring another action against Senator Kennedy and the Committee to Re-Elect Senator Kennedy in this context --i.e., a petition filed pursuant to 2 U.S.C. 437g (a)(8)(A) and (B) for review of Commission action. Of course, the Commission does not assert that should the statutory prerequisites of 2 U.S.C. 437g (a)(8)(c) subsequently be satisfied, plaintiff could not then bring a private cause of action against Senator Kennedy and the Committee to Re-Elect Senator Kennedy under that provision.

****

WHEREFORE, for the reasons set forth above, defendant FEC requests that its motions to dismiss be granted.

Respectfully submitted,

_____
Charles N. Steele
General Counsel

_____
Lawrence M. Noble
Assistant General Counsel

_____
Marsha G. Gentner
Attorney

Deborah Felton
Attorney

Dated: February 23, 1983

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C.

(202) 523-4175

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALWIN E. HOPFMANN,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 82-3667
	)	
FEDERAL ELECTION COMMISSION, et al.	)	
	)	
Defendants.	)	

PLAINTIFF'S REBUTTAL AND CLARIFICATION OF CERTAIN ISSUES AND REPRESENTATIONS RAISED BY DEFENDANT

In response to the reply filed by the FEC, plaintiff would like to make the following points:

1. Plaintiff's objection to the dismissal of Kennedy and his Committee with prejudice continues, as does its qualification of its concurrence with the FEC's motion in that regard. Plaintiff has alleged in its constitutional bill of particulars that various constitutional rights, and in particular, the rights of equal protection of the law have been violated by the FECA. Therefore,

plaintiff requests that its order be adopted and the dismissal be without prejudice in order that plaintiff's rights may be preserved in the event that it is held that requiring plaintiff to exhaust further administrative remedies is in effect unconstitutional.

****

Respectfully submitted,

Laurence A. Elgin
Attorney for Plaintiff
Suite 307
1317 F Street, N. W.
Washington, D. C. 20004
202/628-1114
D. C. Bar No. 159582

[stamped] RECEIVED AT THE FEC
[HANDWRITTEN] 6a # 8620

[stamped] 82 Oct 8 P2:01

EPSTEIN BECKER BORSODY & GREEN, P.C.
ATTORNEYS AT LAW
1140 19TH STREET, N.W.
WASHINGTON, D.C. 20036

(202) 861 0900

****

[NAMES OF FIRM MEMBERS ON LETTERHEAD]

October 7, 1982

Charles N. Steele, Esquire
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: MUR 1468

Dear Mr. Steele:

In accordance with the instructions of Kenneth A. Gross, Esq., in his letter of September 16, 1982 and the requirements of 2 U.S.C. 437g(a)(1), the Committee to Re-Elect Senator Kennedy (the "Committee") submits this letter in support of its position that no action should be taken against it on the basis of the complaint. The complaint which precipitated this MUR can be distilled down to one underlying allegation; the nominating procedure of the Massachusetts Democratic Party for United States Senator was completed at the party's convention of May 21 and 22, 1982 and not by the September 14, 1982 primary election when Senator Kennedy was nominated as the Democratic party nominee for United States Senator. Based on this

premise, the complainant asserts that the Committee has violated just about every reporting requirement,and contribution and expenditure limitation governing federal elections.

The complaint is utterly without merit in that it misconstrues Massachusetts law, the Federal Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. Secs. 431 et seq., and the regulations promulgated thereunder, 11 C.F.R. Secs. 100.1 et seq. Hence, the Commission is urged to find that there is no reason to believe that a violation of the Act has been committed.

The Commission has consistently held that in order to determine whether a party convention has authority to nominate a cndidate and thus be deemed an "election" within the meaning of 2 U.S.C. Sec. 431(1)(B) hinges on an analysis of state law pertaining to the power and role of political party conventions in the nominating of candidates for Federl office. See Adivsory [sic] Opinions 1978-30, Fed. Elec. Camp. Guide (CCH) Par. 5320; 1976-58, Fed. Elec. Camp. guide (CCH) par. 5211. Massachusetts law recognizes that the Democratic party and its members enjoy a constitutionally protected right of political association. Opinion of the Justices of the Massachusetts Supreme Judicial Court, at 4 (April 23, 1982). The affairs of the Democratic party, therefore, must be under final authority of the State Convention, the highest authority of that party. See Charter and Platform of the Democratic Party of the Commonwealth of Massachusetts, Article Six, Section I.

This authority, however, does not

extend to nomination of the individual who will run in the general election as the Democratic nominee for the United States Senate. Under Massachusetts law, it is the winner by a plurality of the Democratic party primary who becomes the party's candidate for the Senate. G.L. c. 53 Sec. 2. Since it is the registered Democrats and Independents who select the party's candidate in Massachusetts, and not the State Convention, that convention does not have authority to nominate candidates for the United Staes Senate and does not constitute a separate election within the meaning of 2 U.S.C. Secs. 431(1)(B). See Advisory Opinion 1978-25, FEd. Elec. Camp Guide (CCH) Par. 5320.

It is irrelevant that the name of no other candidate appeared on the Democratic party ballot. The reporting, contribution and exenditure limitations apply with respect ot each election in which a candidate for the U.S. senate seeks nomination or election. See 2 U.S.C. Sec. 441a(a)6; 11 C.F.R. Sec. 110.1(j)(1). Indeed, the regulations go on to provide that an election in which a candidate is unopposed is still a separate election. 11 C.F.R. Sec. 110.1(j)(2). It is of no consequence that the candidate has received the endorsement of his party prior to running unopposed in the primary. Advisory Opinion 1978-41, Fed. Elec. Camp. Guide (CCh) Par. 5331.

Finally, it must be noted that Senator Kennedy was not the only candidate eligible voters could cast their ballot for oN September 14, 1982. Nothing in the Democratic Party Charter, nor the laws of Massachusetts preclude write-in voting. In that same view, there is nothing in the

Charter or State law which prohibits an individual who does not receive an endorsement of the party within the meaning of Article Six, Section III of the Charter, from mounting such a campaign.

Senator Edward M. Kennedy was nominated on September 14, 1982 to be the Democratic party candidate for the general election to the United Staes Senate. As such, all contributions received the Committee to Re-Elect Senator Kennedy, prior to that date were for the primary election. Furthermore, compliance with the filing and reporting requirements of the Federal Election Laws must be viewed from that date.

Respectfully submitted

William C. Oldaker

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE, BOSTON

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

June 3, 1982

Secretary of State
Michael Joseph Connolly
State House
Room 340
Boston, Massachusetts 02133

Dear Secretary Connolly:

I write to request that you reconsider your decision to exclude from the Democratic primary ballot those individuals who have met all the requirements of state law to qualify themselves as candidates for nomination but failed to receive at least 15 percent of the votes cast at the recent Democratic Convention. I know, from our joint submission to the Supreme Judicial Court on the questions propounded by the Governor concerning the so-called "15% Rule" and our prior communication on that subject, that you are not a supporter of the rule and made your decision in part because of a desire to secure a "prompt and just judicial resolution" of the issue. I am also aware of your attempt to harmonize the discordant party rule with state law in accordance with the thrust of the April 23rd Opinion of the Justices.

Nevertheless, I believe state law requires you to cause the names of the excluded candidates for nomination to be printed on the ballot and therefore will not defend your decision in the civil actions now pending before state and federal courts. Furthermore, it is my

current intention to file a complaint in a state court naming you as a defendant and seeking relief in the nature of an order of mandamus, compelling you to fulfill your ministerial duties and to include the names of these individuals on the ballot.

My decision was not an easy one and it would be impossible for me to fully articulate my reasoning in this brief request that you reconsider. Certain essential points, however, do bear highlighting. First, the Opinion of the Justices on which you rely, was purely advisory and is entitled to no stare decisis effect. Furthermore, it did not deal with the question of the scope or validity of the existing state laws concerning candidates for nomination at state primaries; instead the Justices answered one question concerning a proposed law and explicitly declined to answer a second as to whether, under pre-existing law, "a candidate may be placed on the...ballot by nomination papers without having received fifteen percent of the vote at the party convention". 385 Mass. 1201, 1202-3 (1982).

By deciding not to place candidates' names on the ballot unless they received fifteen percent of the vote, you have answered the question left open by the Court in its advisory opinion. Frankly, such decisions are not committed to your discretion. As Secretary of the Commonwealth, you are not authorized to decline to follow a statute's explicit commands based on your views as to its constitutionality, whether on its face or as applied. See, e.g., Tsongas v Secretary of the Commonwealth, 362 Mass. 708, 713 (1972); School Committee of

Springfield v Board of Education, 362 Mass. 417, 431-432 (1972). It may well be that a court of competent jurisdiction will decide that the names of the candidates who failed to receive the support of fifteen percent ofthose voting at the convention may not appear on the ballot, but under our system of government with its doctrine of separation of powers,that is a matter for the judicial and not the executive branch of goernment. In the instant case, your understandable doubts about the constitutionality of the statutory scheme could have been appropriately resolved in a variety of ways, including both the active step of seeking declaratory relief under G.L.C. c. 231A and the passive step of following the applicable state statutes and defending them in any litigation which might result. See, School Committee of Springfield, 362 Mass. at 432. Either course of conduct could have secured the "prompt and just judicial resolutin" you seek. In the absence of a judicial declaration of a constitutional violation, however, I believe you lack authority to exclude otherwise qualified candidates for nomination from the ballot.

In closing, I note that you have requested that I authorize Samuel Hoar, John Kenneth Felter and Paul F. McDonoough, Jr. to appear for you in the cases in which I decline to represent you. I hope it will be unnecessary to reach this issue because you will have reconsidered your decision to exclude those candidates who have filed suit against you. In accordance with the procedures outlined in Secretary of Administration and Finance, 367 Mass 154, 165 n. 8 (10075), I hereby authorize their appearance in the event your position

remains unchanged.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL